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HAROLD B. WILLEY,

No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, *Petitioner*

V.

STATE OF ARIZONA *et al.*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FACTS

The facts leading up to the decision of the Court of Appeals are substantially set forth in the petition pp. three et. seq. While it is not proposed to go into the merits of the case, it should be noted herein, parenthetically at least, that this is not essentially a suit between the United States of America and the State of Arizona. The United States herein by its third party complaint sought to substitute the State of Arizona as a defendant in a tort claim brought by a private individual against the United States of America. There is thus presented an attempt to sue the State of Arizona

in a manner to which it has not consented and by means completely at variance with its own methods which it, in the exercise of its sovereignty has prescribed. The fact that the Court of Appeals has dismissed the appeal on jurisdictional grounds represents merely a speeding up of the processes of justice.[1]

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. No error was committed by the Court of Appeals in dismissing the appeal.

The Court of Appeals followed its own precedents and those of other Circuits as well as the law of this Court in dismissing the appeal. The attempted appeal was from an order granting a motion to dismiss the third party complaint. This was clearly an unappealable order. Rule 54(a) and 28 U.S.C.A. 1291. For further authority see cases cited by the Court of Appeals, transcript p. 55. This holding in no wise conflicts with any cases in this Court or in any of the other Circuit Courts. Hoiness v. United States 335 U.S. 297 cited by the petitioner is not in point. There the appeal was timely regardless of which order was appealed from. The assignments of error framed in the appeal attacked the basis of the first order as well as the second. That is not the situation in the present case. Here the notice of appeal specifically states that it is from the order 'of the United States District Court entered on the sixth day of October 1952 granting the motion of the defendant State of Arizona to dismiss the third part complaint against

[1]Merely to fully inform the Court as to the respondent's Position herein, we summarize the defense which was presented to the District Court on which dismissal was based. It was contended and the District Court held that it had no jurisdiction over the parties and subject matter.

the third party defendant.' The statement of points of the petitioner accompanying the notice of appeal urges as error the action of the District Court.

1. In holding that the United States Supreme Court has exclusive jurisdiction over a controversy between The United States and a State.

2. In holding that it had no jurisdiction under the Federal tort claims act of the third party complaint filed by the United States against the State of Arizona.

3. In failing to hold that the United States was not required to comply with the conditions prescribed by the Arizona Legislature in bringing suit against that State and

4. In granting Arizona's motion to dismiss the third party complaint and in dismissing the third party complaint.

Here the United States Attorney deliberately picked out the order which he sought to appeal from. He assigned as errors what he deemed to be the effective portions of that order. He deliberately left out the order which would have been appealable to wit 'that the case be and it is dismissed without prejudice as to the third party defendant.' Nor is this case comparable to Martin v. Clarke 105 Fed. 2nd 685 wherein the judgement was erroneously referred to as being in favor of the defendant instead of the plaintiff and the judgment or order was otherwise properly and completely identified. With respect to another case cited by petitioner, Milton v. United States 120 Fed. 2nd 94 we call the Court's attention to this reservation by the Court of Appeals for the Fifth Circuit, 'in the interest of justice and to avoid pro-

longing the litigation for no good purpose *without intending to create a precedent* we consider we may disregard the motion to dismiss the appeal and decide the case on its merits.

As no reasonable error appears from the record the judgement is affirmed.' (Emphasis supplied)

Counsel has not seen the appeal or opinion in Preferred Insurance Co. v. United States 13889 Court of Appeals Ninth Circuit decided August 31, 1953. However from the facts as set forth in note 6 p. 12 of the petition herein it would seem fairly obvious on merely a cursory examination that the facts are not similar to the situation herein. Therein, and we now quote from note 6 p. 12 of the petition 'the notice of appeal filed after dismissal of the case stated the correct date of the order of dismissal but described that order as one granting the motion to dismiss and failed to state that the order appealed from actually dismissed the case.'

Petitioner's second argument for the granting of a writ herein cites as the only authority Crutcher v. Joyce 134 Fed. 2nd 809 (Court of Appeals Tenth Circuit). Therein the Court delineated the necessary steps by which the finality of the Court's judgment is to be attained, and vesting such an order with a finality such as would make it an appealable order. The Court then continued 'but the provisions in question are part of an order which completely determine the rights of one plaintiff and dismissed the entire action as to him and *they were intended by the trial court to be and constitute a final order of adjudication,* dismissing in like manner, the action as to these causes, not

merely parts or all of the complaint.' (Emphasis supplied) This is a far cry from what happened in the instant case where the Court felt constrained to make a further order dismissing the case as to the third party defendant. Thus the facts are different and the case is not in point.

The majority opinion has fully discussed all phases of this matter and counsel would consider it presumptious to dwell at great length thereon. They are submitted for the Court's earnest consideration in deciding the question as to whether a writ should issue herein.

While counsel for petitioner has stated that the need for review is 'underscored because the decision of the Court of Appeals seems to depart from well settled law as to the finality and appealability of an order of dismissal of a complaint.....", no applicable authority or facts from which such a conclusion could be drawn have been presented in the petition. Nor do any of the cases cited by the petitioner indicate any conflict between this decision and any of the other Circuit Courts or of this Court. To respondent the majority opinion is amply clear and presents no ambiguity or confusion which would justify the intervention of this Court by the issuance of a writ.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

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